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Reading the small print

Hakan Tüfekçi of Yalçın & Toygar & Tüfekçi takes a closer look at Turkey's approach to vessel arrest as detailed in its recently revised Commercial Code

The issue of vessel arrest is a complex and challenging one, and, of course, closely tied to the provisions and requirements of different legal jurisdictions. Much is written about vessel arrest in jurisdictions such as the United States, but it is perhaps timely and useful to look at vessel arrest rules as they apply to Turkey, particularly since the introduction of a new Turkish Commercial Code (TCC).

Unlike common law countries, Turkey is a civil law country following the civil law rules and codes on pre-trial/*ex parte* attachment in practice. Under these rules, all assets of a debtor can be subject to arrest (known as cautionary attachment). Before the introduction of the revised TCC in 2012, these assets may, of course, have included ships but it should be noted that there was no requirement that a claim, under which a ship could be arrested, should be of a maritime character.

Furthermore, the former TCC did not contain any special provisions about the arrest procedure for ships but instead applied the relevant articles of the Enforcement and Bankruptcy Code (EBC). Similarly in a case of bankruptcy, relevant provisions did not appear in the former TCC but were included in the EBC. According to Article 257 of the EBC, all properties of a debtor can be arrested and this provision has been regarded as an obstacle to the development of marine trade.

However, with regard to ship arrest, the new TCC has been

brought in line with the Arrest Convention 1999 (AC 1999), and it is instructive to take a closer look at some of the law's key provisions and how they compare to the laws governing ship arrest in other jurisdictions.

Exercise of the right of arrest

Article 1369 of the new TCC reflects Article 3 of the AC 1999, with one exception. Under Turkish law, the judicial sale of a ship to discharge a debt of a demise/bareboat charterer is only permissible if that claim gives rise to maritime lien according to Article 1320 of the new TCC.

Therefore, the holder of a maritime claim (a maritime claim which does not give rise to maritime lien) cannot arrest a ship for a debt of a demise/bareboat charterer unless the demise/bareboat charterer is the owner of that ship when the arrest is affected. Because of the necessity for a special regime of marine arrest and to prevent unlawful practices, Article 1353(1) of the draft TCC provides that the arrest of the ship is the only remedy for maritime claimants and no other injunction can be granted.

Law governing arrest and enforcement procedure

Article 1350 of the new TCC provides that all matters relating to the procedure of arrest, enforcement, judicial sale and the results of this sale (including the transfer of ownership) shall be regulated by the law of the State where enforcement takes place (*lex fori*). This provision is adopted from Article 2 of the Maritime Liens and Mortgages Convention of 1993.

List of maritime claims

Article 1353(1) of the new TCC states that a ship can be arrested to provide security for a maritime claim, and Article 1352 then lists these claims. This list is adopted from Article (1) of the AC 1999. The only difference between the new article and the AC 1999 appears to be a paragraph of Article 1352, referring to claims for 'disbursements' incurred on behalf of the ship and her owners *including loans taken for the ship*. The italicised words do not appear in the AC 1999.

Competent court

In terms of a competent court, the new TCC makes a distinction between Turkish ships and foreign vessels. Article 1354 provides that the competent court in the case of a Turkish vessel is the court of the place in Turkey where the ship is anchored, moored or undergoing repair. Furthermore, if she is registered under the Turkish Registry, the

competent court is the court of her registry. If she is Turkish but unregistered, the relevant court is the domiciliary court of her owner, and if she is registered to a special registry (which is regulated by the Ministry of Transportation Maritime and Telecommunication), the relevant court is the domiciliary court of the demise/bareboat charterer.

Article 1355 of the new TCC provides that the competent court in the case of a foreign vessel is the court of the place in Turkey where the ship is anchored, moored or undergoing repair.

Arresting the ship

Under the former ship arrest regime, a court could order for the arrest of a ship *ex parte* (without any hearing). However, the claimant must submit strong evidence to the court about the claim. If the court finds the evidence adequate, and especially in circumstances where the ship might soon depart, the court will order the vessel's arrest. Under the new ship arrest regime, it is now adequate if the claimant shows that its claim is one of those stated in Article 1352 (maritime claims) and can show evidence of its value.

Counter-security

There is no provision regarding counter-security in the earlier TCC; instead, the general provisions of the EBC applied. According to Article 259 of the EBC, the claimant has to put up counter-security to compensate the debtor's and third parties' losses in case of a wrongful arrest. In practice, counter-security proved to be between 10% and 40% of the claimed amount determined by the competent court.

The new TCC requires claimants requesting arrest to provide counter-security in a standard sum of SDR (Special Drawing Right) 10,000 (approximately equivalent to \$14,200). However, claimants can request a reduction in the amount from the court after the arrest takes place. The defendant can also request an increase using the argument that the security is too little in comparison with its potential losses in case of wrongful arrest.

Enforcement of the arrest order

Once the court grants an arrest order, a claimant will have to request the arrest within three days from the relevant enforcement office; otherwise the arrest order will lapse automatically. Once the enforcement office has been requested to arrest the ship, it has to start the arrest procedure immediately.

Time limit for bringing an action

In order to enforce a cautionary attachment,

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once the ship is arrested and the claimant is notified of such arrest, the claimant has to bring an action before the court/enforcement office within a month upon the enforcement of the arrest – otherwise the arrest will be lifted automatically.

Arrest of ships which are ready to sail

Previously, a ship loaded for departure or otherwise ready to sail was not subject to arrest because of the provisions of Article 892 of the ex-TCC. The new TCC now enables the arrest of ships in port without considering whether they are ready to sail or not.

Sister ship arrests – associated ship arrests

Under the ex-Turkish law regime, all assets of the debtor can be subject to arrest. This might also include other ships of the debtor.

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However, under the new TCC, the arrest of any other ship of a shipowner will be permitted provided that it is owned by the person liable for the maritime claim. The new TCC, however, has no provision for associated ship arrest.

Release from arrest

According to Article 1370 of the new TCC, security in the form of real security, a ship mortgage or a bank letter of guarantee in lieu of the ship can be accepted. In this case, since the ship is released on condition, a record must be made on its registry concerning the arrest. The release should be communicated to the ship’s registry or, if it is a foreign ship, to the nearest consulate of the ship’s flag. Similarly under Article 1371, the shipowner or the debtor putting up sufficient security to cover the maritime claim, including interest and other expenses, but not exceeding the value of the ship, may request the lifting of the arrest order from the court.

A comparison with other jurisdictions

As previously stated, Turkey is not a signatory of the Arrest Convention 1999 but the TCC has been brought into line with this Convention which, in other words, means that Turkey is a favourable jurisdiction in terms of ship arrest,

unless the debtor is not the contractual party of the claimant.

However, bunker claims are not considered as a maritime lien unlike in the former TCC regime (Article 1235 of the old regime recognised bunker claims as maritime liens). Therefore, if a vessel which is sold after bunkers have been supplied to her and the debt of such bunker supply is not paid by her ex-registered owner, manager, or operator, the bunker company has no right to arrest the vessel for the debt arising during the ownership period of her former owners.

On the other hand, due to the opportunities for a fast, *ex-parte* hearing, as well as less onerous proof of claim requirements, Turkey can be seen as a favourable arrest jurisdiction for any claims (including bunker claims) which are specified under Article 1352 of the recent TCC.

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